

# Procedural Good Faith in International Arbitration

**A N D R E A   H U L B E R T**

**ADVANCE ARBITRATION & MEDIATION**

# The Notion of Good Faith



# Good Faith

*(noun)*

“The **principle of good faith radiates throughout the legal system** and imposes a series of behaviors on public and private persons,

- in the procedural sphere (administrative procedures carried out within the public administration),
- procedural (in the various jurisdictional processes)
- and contractual (as regards the formation, execution, and termination of contracts).

“...the main characteristic of the principle of good faith is that **it covers the requirement of a series of behaviors that apply to all branches of the legal system** and that, at the same time, are enforceable on any person, whether under public or private law.” (Rojas Ortega, Alex. Constitutional Magazine No. 3-2021, Costa Rica) (free translation).

Do the parties, the tribunal  
and the institutions have a  
duty to arbitrate in good faith?

**A N D R E A   H U L B E R T**

**ADVANCE ARBITRATION & MEDIATION**

# The General Principles of Law?

**A N D R E A   H U L B E R T**

**ADVANCE ARBITRATION & MEDIATION**



# Good Faith in International Law

1. U.N. General Assembly adopted the Declaration of Principles of International Law on Amicable Relations and Cooperation among States
2. Statute of the International Court of Justice
3. Vienna Convention on the Law of Treaties
4. U.N. Convention on Contracts for the International Sale of Goods
5. ICSID Rules



**A N D R E A   H U L B E R T**

ADVANCE ARBITRATION & MEDIATION

U.N. General Assembly adopted the Declaration of Principles of International Law on Amicable Relations and Cooperation among States

**“Every state has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.”**



# Statute of the International Court of Justice

## Art 38.1

“The **general principles of law** recognized by civilized nations” constitutes one of the sources of international law which must be applied by the Court.”





# Vienna Convention on the Law of Treaties

## Art 31, paragraph 1

*Preamble: “the **principles of free consent and of good faith** and the **pacta sunt servanda** rule are universally recognized.”*

**“[a] treaty shall be interpreted in good faith** in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”



## U.N. Convention on Contracts for the International Sale of Goods

“in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the **observance of good faith in international trade.**”



# Good Faith in International Arbitration

# Sources of the Principle of Good Faith in Commercial Arbitration

---

1. The arbitration clause has the agreement to act with fairness, reasonableness, and decency.
2. The chosen Lex arbitri.
3. Institutional rules may impose the duty.
4. The chosen soft law in the contract or the POI.
5. The law applicable to the dispute.
6. Specific regulations agreed on POI.





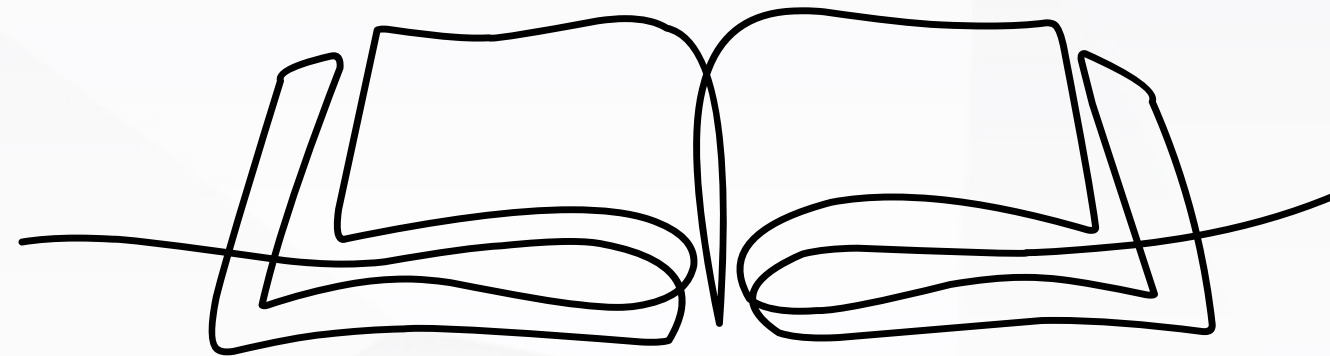
# The Arbitration Agreement



**A N D R E A   H U L B E R T**

**ADVANCE ARBITRATION & MEDIATION**

# Lex Arbitri



**A N D R E A   H U L B E R T**

**ADVANCE ARBITRATION & MEDIATION**

# UNCITRAL Model Law on International Commercial Arbitration

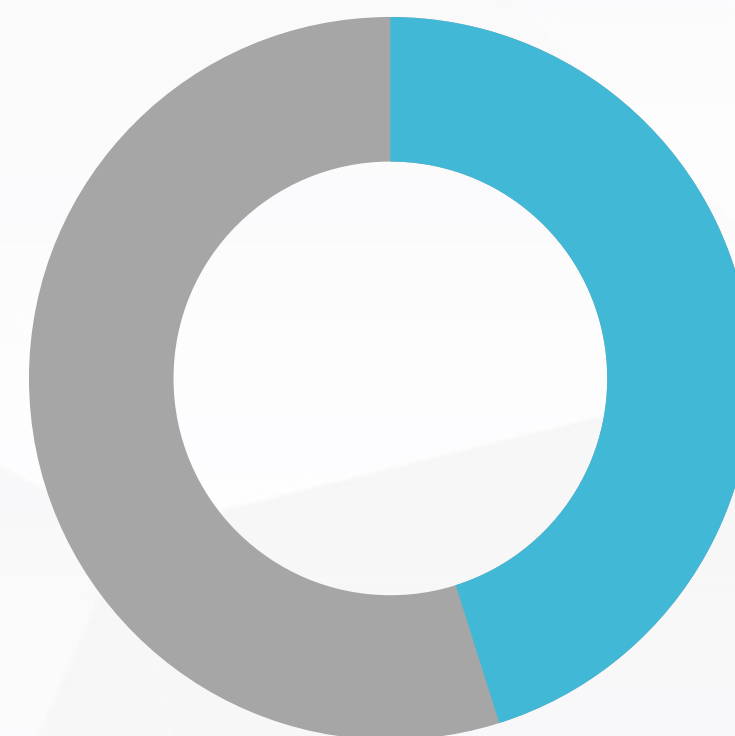
**“Article 2 A. International origin and general principles.**

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote **uniformity in its application and the observance of good faith.**

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

**Legislation based on or influenced by the Model Law has been adopted in 88 states (121 jurisdictions) out of 195 states.**



# Examples of countries with procedural rules on good faith

- Argentina
- Brazil
- Canada
- Colombia
- El Salvador
- Germany
- Guatemala

- Nicaragua
- Panama
- Paraguay
- Perú
- Spain
- Switzerland
- Uruguay



# Institutional Rules

**Milán Chamber of Arbitration Rules 2023**

**MIAC Arbitration Rules Madrid**

**LCIA Arbitration Rules**

**ICSID Arbitration Rules 2022**

**China (4)**

**A N D R E A H U L B E R T**

ADVANCE ARBITRATION & MEDIATION

# Milán Chamber of Arbitration Rules 2023

---

## **“ART. 9 – FAIR CONDUCT.**

1. The Chamber of Arbitration, the arbitrators, the experts, the parties and their counsel shall act in **good faith** along any phase of the proceedings.
2. The parties commit to enforce the awards, the orders and decision of the arbitrators.
3. The **Arbitral Tribunal may sanction any breach of its decisions and any unlawful conduct that is contrary to good faith.**
4. When deciding on the allocation of the costs, the Arbitral Tribunal shall take into consideration the conduct of the parties and their counsel.”

# MIAC Arbitration Rules - Madrid

---

**“25.4. Procedural rules (...)** “All persons participating in the arbitration proceedings shall act in accordance with the principles of **confidentiality and good faith**. The parties and their legal counsel or legal representatives must avoid unnecessary delays in the proceedings, and their actions may be taken into consideration by the tribunal when determining the costs of the proceedings.”

# LCIA Arbitration Rules

---

“**14.2** The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to the mandatory provisions of any applicable law or any rules of law the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do **everything necessary in good faith** for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal’s discharge of its general duties.”

---

“**32.2** For all matters not expressly provided in the Arbitration Agreement, **the LCIA, the LCIA Court, the Registrar, the Arbitral Tribunal, any tribunal secretary and each of the parties shall act at all times in good faith**, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.”



# China

---

## CIETAC

- “**Article 9 Good Faith:** Arbitration participants shall proceed with the arbitration in **good faith.**”

## BIAC

- “**Article 8 Bona Fides:** The parties shall proceed with the arbitration in a **bona fides** manner.”

## SHIAC

- “**Article 2: Scope of Application:** (...) (4) When applying the Rules, the BAC, the Arbitral Tribunal, the parties and their representatives shall act in accordance with the **principles of good faith**, collaboration, and appropriate resolution of the dispute.”

## SCIA

- “**Article 7 Bona Fide Cooperation:**
  - 1. All the parties and their representatives shall proceed with the arbitration in **bona fide** and cooperative manner...”

# Soft Law

**IBA Guidelines on Taking of Evidence in International Arbitration (2020)**

**IBA Guidelines on Party Representation in International Arbitration**

**CEIA Code of Best Practices in Arbitration of the CEIA**

**UNIDROIT**

**A N D R E A   H U L B E R T**

**ADVANCE ARBITRATION & MEDIATION**

# IBA Guidelines on Taking of Evidence in International Arbitration (2020)

---

**Preamble 3:** “The taking of evidence shall be conducted on the principles that **each Party shall act in good faith** and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.”

**Article 9.6:** “If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, **the Arbitral Tribunal may infer that such document would be adverse** to the interests of that Party.”

# IBA Guidelines on Party Representation in International Arbitration

---

**Preamble:** “The IBA Guidelines on Party Representation in International Arbitration (the ‘Guidelines’) are inspired by the principle that **party representatives should act with integrity and honesty** and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.”



# CEIA Code of Best Practices in Arbitration of the CEIA

---

**“Article 27.6. Procedural rules (...) “All persons participating in the arbitration proceedings shall act in accordance with the principles of confidentiality and good faith.** Furthermore, they undertake to perform their functions in accordance with the Code of Best Practices of the Club Español del Arbitraje (2019). The parties and their lawyers must **avoid unnecessary delays** in the proceedings, and their actions may be taken into consideration by the tribunal when determining the **costs** of the proceeding.”

# UNIDROIT Principles

---

**“ARTICLE 1.7 (Good faith and fair dealing)** (1) Each party must act in accordance with **good faith** and fair dealing in international trade. (2) The parties may not exclude or limit this duty.”

**“ARTICLE 5.1.2 (Implied obligations)** Implied obligations stem from (a) the nature and purpose of the contract; (b) practices established between the parties and usages; (c) **good faith and fair dealing**; (d) reasonableness.”

# The Law Applicable to the Dispute

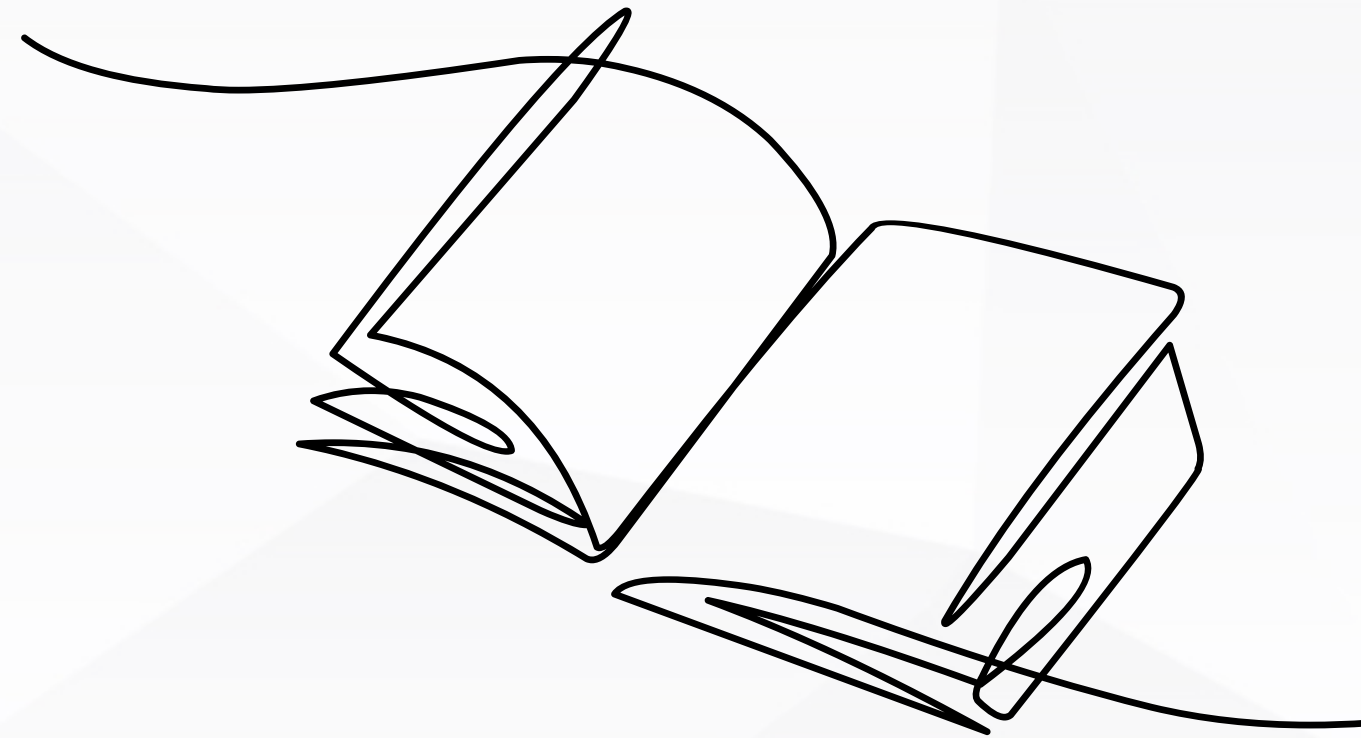


**Legal Systems: Anglo-Saxon (judicial case law system) & Continental or Civil (Codified System)**

1. Argentina
2. Brazil
3. Chile
4. Colombia
5. Ecuador
6. El Salvador
7. France
8. Germany
9. Guatemala
10. Netherlands
11. Panamá
12. Paraguay
13. Perú
14. Spain
15. Switzerland
16. Uruguay



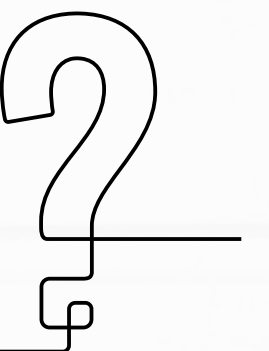
# Procedural Orden No. 1





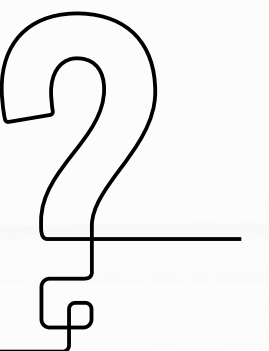
# Questions

1. Should good faith be something that the tribunal and the parties infer, or is good faith a principle that should be addressed explicitly?
2. Is there a chance that parties from different countries may not be clear about the notion of good faith and its extent in the procedure?
3. Would it be better if the Tribunal and the Parties included specific provisions about the notion and the duty to act in good faith and its consequences in the Case Management Conference?
4. If the PO1 includes those provisions, are we establishing a level playing field between the parties, the counsels, and the members of the Tribunal?



# Questions

1. Will including the duty to arbitrate in good faith in PO1 facilitate the analysis and decision-making process for the arbitrators, mainly when they have from different backgrounds?
2. Or is it fine and acceptable not to talk about the mandatory conduct in good faith during the procedure, when is the the applicable law, but to apply it and its consequences in the award?
3. Wouldn't that be a surprise for the parties?
4. Can the Tribunal have certainty that when the parties agree on the arbitration clause, they envision to have a duty to arbitrate in good faith?



---

**A N D R E A   H U L B E R T**

ADVANCE ARBITRATION & MEDIATION

# Thank you!

**A N D R E A   H U L B E R T**

**ADVANCE ARBITRATION & MEDIATION**